

INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

PAUL BURNHAM,)
)
Claimant,)
)
v.)
)
IDAHO CONCRETE,)
)
Employer,)
)
and)
)
LIBERTY MUTUAL FIRE INSURANCE)
COMPANY,)
)
Surety,)
)
Defendants.)
_____)

IC 2004-512882

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION

Filed May 7, 2008

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Michael E. Powers, who conducted a hearing in Boise on October 17, 2007. Claimant was present and represented by Richard S. Owen of Nampa. Kent W. Day of Boise represented Employer/Surety. Oral and documentary evidence was presented and the record remained open for the taking of two post-hearing depositions. The parties then submitted post-hearing briefs and this matter came under advisement on January 28, 2008.

ISSUES

By agreement of the parties, the issues to be decided by the Commission as the result of the hearing are:

RECOMMENDATION - 1

1. Claimant's entitlement to total or temporary partial disability (TTD/TPD) benefits; and
2. Whether and to what extent Claimant is entitled to permanent partial disability (PPD) benefits.

CONTENTIONS OF THE PARTIES

Claimant contends that he is owed temporary total or temporary partial disability benefits for a period of time that he was being treated for a lumbar spine problem after he was declared medically stable from a pelvic injury. He further contends that he is entitled to disability inclusive of his uncontested 36.3% whole person permanent partial impairment of at least 50%.

Defendants contend that Claimant is not entitled to any further time loss benefits because his treating physician for his back never prevented him from working as a school bus driver. They further contend that Claimant is not entitled to any disability above his impairment, or, if he is, such should be minimal.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant taken at the hearing.
2. Claimant's Exhibits 1-7 admitted at the hearing.
3. Defendants' Exhibits A-Q admitted at the hearing.
4. The post-hearing deposition of Nancy Collins, Ph.D., CRC, FVE, ABDA, CLCP, taken by Claimant on November 5, 2007, and Mary-Barros-Bailey, Ph.D., CRC, CDMS, CLCP, NCC, ABCE-D, taken by Defendants on November 30, 2007.

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Defendants' objection at page 39 of Dr. Collins' Deposition is sustained. Defendants' objection at page 50 of Dr. Barros-Bailey's Deposition is also sustained. All other objections are overruled.

FINDINGS OF FACT

1. Claimant was 57 years of age and resided in Adrian, Oregon, at the time of the hearing.

2. Claimant's work history is primarily that of a truck driver. He has driven both long and short hauls but has mainly driven cement and asphalt trucks. He also has operated heavy equipment and has some mechanical skills.

3. On June 15, 2004, Claimant was driving Employer's cement truck from Garden Valley toward Banks when his right front tire went off the pavement, causing the truck to flip over. Claimant was thrown from the vehicle and was found between the cab and the drum. He was airlifted to Saint Alphonsus Regional Medical Center in critical condition.

4. Claimant was diagnosed with multiple pelvic fractures, contusions and abrasions, and a mild closed head injury. On June 17, Gregory Schweiger, M.D., performed an ORIF repair to Claimant's pelvis. Claimant then came under the care of Michael McMartin, M.D., a physiatrist. He also developed right lower extremity DVT and was started on anticoagulation therapy by Brian Goltry, M.D. Claimant was discharged on June 29, 2004.

5. Claimant participated in physical therapy and by July 9, 2005, Dr. Schweiger declared Claimant's pelvis healed. He deferred to Dr. McMartin regarding continuing physical therapy and assigning work restrictions. Dr. McMartin declared Claimant medically stable as of June 29, 2005, and assigned a 30% whole person PPI rating for Claimant's pelvis and released him to medium work with no specified restrictions.

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6. Because Claimant was complaining of back pain, Dr. McMartin referred him to Timothy Doerr, M.D., an orthopedic surgeon, on November 7, 2005. Claimant first saw Dr. Doerr on November 23, 2005, at which time he opined that Claimant's back problems were related to degenerative anterolisthesis of L4 on 5 and from a sagittal malalignment from his T12 fracture. Dr. Doerr treated Claimant with a series of epidural steroid injections and physical therapy. On December 20, 2005, Dr. Doerr released Claimant to return to work with a 20-pound lifting restriction and no bending, twisting, stooping, or crouching, although he continued with the injections and physical therapy.

7. In a March 16, 2006, letter to Claimant's counsel, Dr. Goltry indicated that Claimant should avoid sitting longer than two hours to lessen the chances of getting more blood clots in his lower extremities.

8. On April 13, 2006, Dr. Doerr assigned a 5% whole person PPI rating for Claimant's T12 stress fracture and an additional 2% for his L5-S1 sensory deficit with 90% apportioned to his industrial accident and 10% to pre-existing disease. He also revised his previous work release to a permanent 30-pound frequent and 50-pound occasional lifting restriction. Although not specifically mentioned one way or the other by Dr. Doerr, it can be reasonably inferred that because he increased Claimant's lifting restrictions, he did not keep in place his restrictions against bending, stooping, etc.

DISCUSSION AND FURTHER FINDINGS

TTD/TPD benefits:

Idaho Code § 72-408 provides for income benefits for total and partial disability during an injured worker's period of recovery. "In workmen's [sic] compensation cases, the burden is on the claimant to present expert medical opinion evidence of the extent and duration of the

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disability in order to recover income benefits for such disability.” *Sykes v. C.P. Clare and Company*, 100 Idaho 761, 763, 605 P.2d 939, 941 (1980); *Malueg v. Pierson Enterprises*, 111 Idaho 789, 791, 727 P.2d 1217, 1220 (1986). Once a claimant is medically stable, he or she is no longer in the period of recovery, and total temporary disability benefits cease. *Jarvis v. Rexburg Nursing Center*, 136 Idaho 579, 586, 38 P.3d 617, 624 (2001) (citations omitted).

For partial disability, during the period of recovery Claimant is entitled to an amount equal to sixty-seven per cent (67%) of his decrease in wage-earning capacity, but not to exceed the income benefits payable for total disability.

9. Claimant asserts in his Reply Brief that, “Partial disability benefits are payable to a claimant, during the period of recovery, to compensate the claimant for the loss of his capability to make a wage equal to that which he was making at the time of his injury.” Reply Brief, p. 2. During the time for which Claimant seeks temporary partial disability benefits, he was working as a school bus driver. While Dr. Doerr did assign work restrictions, he did not take Claimant off work or in any way indicate that he should not be driving the bus. There is no evidence that Claimant was unable to perform his school bus driving duties or that he missed any work due to his back problems. There is no evidence that Claimant incurred a decrease in his wage earning capacity during Dr. Doerr’s treatment, nor is there any medical evidence that he was in a period of recovery or any medical evidence regarding the extent and duration of his disability. Claimant simply continued doing the work that was available to him.

10. The Referee finds that Claimant has failed to prove his entitlement to temporary partial disability benefits.

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PPD benefits:

“Permanent disability” or “under a permanent disability” results when the actual or presumed ability to engage in gainful activity is reduced or absent because of permanent impairment and no fundamental or marked change in the future can be reasonably expected. Idaho Code § 72-423. “Evaluation (rating) of permanent disability” is an appraisal of the injured employee’s present and probable future ability to engage in gainful activity as it is affected by the medical factor of impairment and by pertinent non-medical factors provided in Idaho Code §72-430. Idaho Code § 72-425. Idaho Code § 72-430(1) provides that in determining percentages of permanent disabilities, account should be taken of the nature of the physical disablement, the disfigurement if of a kind likely to handicap the employee in procuring or holding employment, the cumulative effect of multiple injuries, the occupation of the employee, and his or her age at the time of the accident causing the injury, or manifestation of the occupational disease, consideration being given to the diminished ability of the affected employee to compete in an open labor market within a reasonable geographical area considering all the personal and economic circumstances of the employee, and other factors as the Commission may deem relevant, provided that when a scheduled or unscheduled income benefit is paid or payable for the permanent partial or total loss or loss of use of a member or organ of the body no additional benefit shall be payable for disfigurement.

The test for determining whether a claimant has suffered a permanent disability greater than permanent impairment is “whether the physical impairment, taken in conjunction with non-medical factors, has reduced the claimant’s capacity for gainful employment.” *Graybill v. Swift & Company*, 115 Idaho 293, 294, 766 P.2d 763, 764 (1988). In sum, the focus of a

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determination of permanent disability is on the claimant's ability to engage in gainful activity. *Sund v. Gambrel*, 127 Idaho 3, 7, 896 P.2d 329, 333 (1995).

11. Claimant retained Nancy Collins, Ph.D., to assist with vocational issues. Dr. Collins is familiar to the Commission and her credentials will not be repeated here. She reviewed various medical and tax records and interviewed Claimant and his wife. Dr. Collins considered the Adrian, Oregon, area as Claimant's labor market, but not the Nampa/Caldwell area. In her August 23, 2007, report, Dr. Collins considered the two-hour sitting restriction imposed by Dr. Goltry for Claimant's DVT condition and Dr. Doerr's original restrictions of no lifting over 20 pounds and no pushing, twisting, stooping, pulling, squatting, and bending. She also considered Claimant's work history of truck driving, his labor market, age, hearing difficulties, and transferrable skills and determined that Claimant had lost access to 84% of his pre-accident labor market and a 30% loss of wage earning capacity resulting in a whole person PPD rating of 50% inclusive of PPI. At her deposition, Dr. Collins was made aware of Dr. Doerr's latest permanent lifting restriction of 30 pounds frequently and 50 pounds occasionally. As previously indicated, Dr. Doerr did not mention the previous ban on bending, stooping, etc. Based on those latest restrictions, Dr. Collins testified that would take Claimant from the light to medium work category. She still opined that with the two-hour sitting restriction and Dr. Doerr's lifting restrictions, Claimant would have a PPD rating of 40-50%.

12. Defendants retained Mary Barros-Bailey, Ph.D., to assist them with vocational issues. Dr. Barros-Bailey's credentials are well known to the Commission and will not be repeated here. Dr. Barros-Bailey did not have the opportunity to personally meet with Claimant, but reviewed pertinent medical, tax, and vocational records. She authored a report dated October 9, 2007. Upon considering factors deemed by her to be relevant in conducting a disability evaluation, Dr. Barros-Bailey determined Claimant to have whole person PPD of 12% inclusive

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of PPI when just considering Dr. McMartin's opinion that he could return to work as a cement truck driver. However, when adding in Dr. Doerr's original restrictions, she increased his PPD rating to 34% inclusive of PPI. Like Dr. Collins, Dr. Barros-Bailey was unaware of Dr. Doerr's latest restrictions until her deposition. She was also unaware of Dr. Goltry's two-hour sitting restriction. She testified that her opinions expressed in her report were somewhat modified by learning of Drs. Goltry and Doerr's restrictions, a dollar an hour more in earnings at Claimant's last job, and Claimant's earnings in 2006. For one thing, his earning capacity would be better as he was actually making closer to his time-of-injury wage than she originally thought, so his 12% PPD would be "eroded a little bit." For another, with Dr. Doerr's latest restrictions, Claimant is now in the medium labor market so her 34% PPD is now closer to 10% - 12% inclusive of PPI. Dr. Barros-Bailey testified there are many truck driving jobs within the medium labor category that Claimant could perform close to his time-of-injury wage and within his sitting and lifting restrictions that are consistently available in "the greater Treasure Valley" labor market which includes all of Canyon County to Meridian. Dr. Barros-Bailey believes Claimant could perform the essential functions of a cement truck driver¹ based on Dr. McMartin's restrictions and could drive all manner of delivery trucks save for Fed Ex and UPS. She does not believe Claimant's sitting restriction is "a big issue" when considering local driving jobs. Dr. Barros-Bailey could not understand why Claimant was willing to drive to Weiser and Emmett to work but would not consider Canyon County.

13. The Referee is persuaded that Dr. Collins' vocational assessment is closer to the reality of Claimant's situation than that of Dr. Barros-Bailey's. One concern of Dr. Collins not addressed by Dr. Barros-Bailey is Claimant's hearing disorder. Another concern is Claimant's

¹ On cross-examination, Dr. Barros-Bailey conceded Claimant could not operate a cement truck requiring the use of chutes, as he had done for a number of years, but could drive a pumper truck.

inability to read well and his lack of computer literacy. While it is true Claimant has found employment post-accident, that employment has been seasonal, less than full-time, and at a lower rate of pay than pre-accident. Even if Claimant was willing to explore the west Treasure Valley labor market, the rising price of gasoline is a legitimate consideration. Claimant's restrictions are fairly innocuous considering the seriousness of his injuries and relatively high PPI rating, yet they will still prevent him from obtaining and performing many truck driving jobs. It was difficult for both vocational experts to factor in Claimant's two-hour sitting restriction, which will obviously limit the number of driving jobs available. It was also unfortunate that both experts were unaware of newer restrictions that placed Claimant in the medium, rather than light work category, and that Dr. Barros-Bailey was unaware of the sitting restriction. Both had to modify their respective opinions at deposition and without time to adequately research the matter so their opinions were, at times, disjointed.

14. After considering the vocational assessments and testimony along with those factors contained within Idaho Code § 72-430, the Referee finds that Claimant has incurred whole person PPD of 45% inclusive of his PPI.

CONCLUSIONS OF LAW

1. Claimant has failed to prove his entitlement to temporary partial disability benefits.
2. Claimant is entitled to whole person PPD benefits of 45% inclusive of his PPI.

RECOMMENDATION

Based upon the foregoing Findings of Fact, Conclusions of Law, and Recommendation, the Referee recommends that the Commission adopt such findings and conclusions as its own and issue an appropriate final order.

DATED this __2nd__ day of May, 2008.

INDUSTRIAL COMMISSION

_____/s/_____
Michael E. Powers, Referee

ATTEST:

_____/s/_____
Assistant Commission Secretary

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

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IC 2004-512882

ORDER

Filed May 7, 2008

Pursuant to Idaho Code § 72-717, Referee Michael E. Powers submitted the record in the above-entitled matter, together with his recommended findings of fact and conclusions of law to the members of the Idaho Industrial Commission for their review. Each of the undersigned Commissioners has reviewed the record and the recommendation of the Referee. The Commission concurs with this recommendation. Therefore, the Commission approves, confirms, and adopts the Referee's proposed findings of fact and conclusions of law as its own.

Based upon the foregoing reasons, IT IS HEREBY ORDERED that:

1. Claimant has failed to prove his entitlement to temporary partial disability benefits.
2. Claimant is entitled to whole person permanent partial disability benefits of 45% inclusive of his permanent partial impairment.

3. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all matters adjudicated.

DATED this __7th__ day of May, 2008.

INDUSTRIAL COMMISSION

____/s/_____
James F. Kile, Chairman

____/s/_____
R.D. Maynard, Commissioner

____/s/_____
Thomas E. Limbaugh, Commissioner

ATTEST:

____/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the __7th__ day of May, 2008, a true and correct copy of **FINDINGS, CONCLUSIONS, AND ORDER** were served by regular United States Mail upon each of the following:

RICHARD S OWEN
PO BOX 278
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KENT W DAY
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____/s/_____

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